IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 297

KIEFER-STEWART COMPANY,

Petitioner,

vs.

JOSEPH E. SEAGRAM & SONS, INC., SEAGRAM-DISTILLERS CORPORATION, THE CALVERT DISTILLING COMPANY AND CALVERT DISTILLERS CORPORATION,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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OPINION BELOW.

The opinion of the Court of Appeals reversing the District Court (R. 399) is reported at 182 F. 2d 228.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

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1. Whether combination of competing sellers to enforce *maximum* resale prices for their products shipped in interstate commerce is a combination in restraint of trade

or commerce within the meaning of the first sentence of Section 1 of the Sherman Act.[1] Act July 2, 1890, C. 647, Sec. 1, 26 Stat. 209, as amended Aug. 17, 1937, C. 690 Tit. VIII, 50 Stat. 693; U. S. C. A. T. 15 Sec. 1.

2. Whether the Court of Appeals erred in holding that evidence of combination or conspiracy was insufficient to support the jury's verdict.[2]

STATUTE INVOLVED.

The only Federal Statute directly involved at this stage of the controversy is the following portion of Section 1 of the Sherman Act:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal:
>
> Act. July 2, 1890, C. 647, Sec. 1, 26 Stat. 209, as amended Aug. 17, 1937, C. 690 Tit. VIII, 50 Stat. 693; U. S. C. A. T. 15, Sec. 1."

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1. The original complaint asserted a combination in restraint of trade (R. 14-16), and also violation of Section 7 of the Clayton Act (Act Oct. 15, 1914, C. 323, 38 Stat. 731, U. S. C. A. T. 15, sec. 18). (R. 9.) The latter assertion was abandoned (R. 401) and the only provision of the "anti-trust laws" now involved is Section 1 of the Sherman Act.

2. The factual assumptions contained in petitioner's statement of the second "question presented" will be discussed hereafter.

STATEMENT OF THE CASE.

Upon the facts in evidence, the Court of Appeals held:

(1) That there was insufficient evidence of combination or conspiracy to support the verdict of the jury. (R. 409.)

(2) That even assuming a combination, the record evidenced no restraint of or attempt to restrain trade in violation of section 1 of the Sherman Act. (R. 409-412.)

Petitioner is a wholesale drug and liquor dealer at Indianapolis, Indiana, and prior to November, 1946, was a distributor of the products manufactured and sold by the Seagram respondents. (R. 16, 20.) Subsequent to October 21, 1946, petitioner made tentative arrangements, never consummated, to become a distributor of the products of the Calvert respondents. (R. 38, 108.)

Respondents, at all times material, have, directly or indirectly, been the wholly owned subsidiaries of Distillers Corporation Seagram, Ltd., a Canadian corporation, which owns all the stock of respondent Joseph E. Seagram & Sons, Inc. Since 1945 the latter corporation, which manufactures distilled spirits, has owned all the stock of Seagram Distillers Corporation and of Calvert Distilling Co. The latter, also a manufacturer, owns all the stock of Calvert Distillers Corporation. Seagram Distillers Corporation and Calvert Distillers Corporation are respectively the sellers and distributors of the products of their immediate parents. (R. 280-281.)

When O. P. A. liquor price control terminated in October 1946, Fischel, sales executive of Seagram, determined not to raise prices and to ask all dealers to conform. (R.

201-202.) Wachtel, Calvert President, made like determination. (R. 230.) These decisions were reached separately, and not discussed between the companies until subsequent to November 6, 1946. (R. 232, 235.) The Seagram policy was announced to all wholesalers by telegram November 6, 1946. (R. 393.) Calvert also made public announcement in the press.[3] (R. 230.)

About November 1, 1946, practically all Indiana liquor wholesalers, including petitioner (R. 308), filed simultaneous notifications of identical resale price increases with the Indiana Alcoholic Beverage Commission. (Defts.' Exs. 1-22, inc., R. 299-322, introduced, R. 163, 164, 165.) Upon learning of this action Fischel, for Seagram, ordered shipments to Indiana discontinued. (R. 204-205.) Wachtel, for Calvert, did likewise. (R. 228.) Both took this action to avoid complicity in an illegal conspiracy of Indiana wholesalers. (R. 204, 228.) Both respondent sales companies and Fischel, individually, had been convicted for participation in a similar conspiracy of Colorado wholesalers. (Defts.' Exs. 23, 24, R. 324, 341, 342, 346; introduced, R. 213.) Seagram advised all Indiana distributors that no more shipments would be made until they "went along with our program", to "hold the line" on prices. (R. 196.) Calvert shipments to Indiana ceased at "the end of the first week or the beginning of the second week" in November, 1946. (R. 221.) "Conferences" between Seagram and Calvert officials concerning this action were held after, but not before the decisions were made. (R. 379, 383, 391, 392, 232, 235, 246.)

Schwalb, Calvert's Central Division Manager, in person, and Gollin, Assistant Sales Manager, by telephone, continued negotiation as to petitioner's new Calvert distributorship, through November 12, 1946. (R. 97.) Schwalb

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3. The Court of Appeals is in error in asserting that, "No policy was ever announced by Calvert other than that it would follow the Seagram policy." (R. 409.)

made detailed arrangement for petitioner to become a Calvert distributor after cessation of Calvert Indiana shipments because he "did not know when we would start shipments, a week, two weeks, three weeks, three months." (R. 221.) Petitioner had never received any Calvert merchandise, and itself had requested deferred shipment of an order already placed. (R. 223, 224.) November 19, 1946, Schwalb notified Moxley, petitioner's President, that the order would be cancelled. (R. 217-218.) Moxley testified that this notice was accompanied by the statement that "we have to go along with Seagram" (R. 40), and that Calvert's general sales manager, Reznik, gave as a reason that they "had to go along with the other side of the house." (R. 41.) Schwalb and Reznik corroborated the refusal but denied the reason given. (R. 218, 240.) Wachtel had determined the Calvert "hold the line policy", not Gollin, Reznik or Schwalb. (R. 228.)

The record does not support the assertion (Petition, p. 6) that "petitioner later capitulated and put into effect the prices demanded by Seagram." Lutz told Grube that "so far as I knew we were filing new prices." (R. 84.) But Lutz failed wholly to assert that any new prices on Seagram merchandise were ever filed by petitioner. (R. 103.)

The "fair trade" contracts of 1947 (R. 287-289) were supplied by the Indiana Alcoholic Beverage Commission pursuant to its fair trade regulation No. 11, and were required to be made to legalize Indiana newspaper advertising of brands and price. (R. 214-215.) What "pretense" (Petition, p. 8) was thereby abandoned is not clear. The "fair trade" prices were the old O. P. A. prices. (R. 104-105.)

It is not true (if relevant) that Seagram cheapened its product. This is the assertion of petitioner's counsel, which the witness refuted. The younger whiskies used are not necessarily less costly. (R. 211-212.)

SUMMARY OF ARGUMENT.

The decision of the Court of Appeals as to the sufficiency of the evidence of conspiracy is not of sufficient general importance to warrant granting the writ. However, that decision is clearly right.

There was no direct contradiction of respondents' witnesses as to the separate conception and origin of the identical price policies followed by the two sales companies, and the circumstances relied upon to show combination or conspiracy are, considered either separately, or together, wholly inconclusive and as easily susceptible of contrary inferences. Thus the Court of Appeals properly held the evidence insufficient to support a verdict in favor of the party sustaining the burden of proof.

The Court of Appeals has also correctly held that the evidence disclosed no violation of Section 1 of the Sherman Act, even assuming that respondents acted in combination. The action taken by respondents to procure observance of former O. P. A. maximums in the resale prices of their products had no tendency to suppress or restrain competition, but the contrary. Hence it could not constitute a violation of Section 1 of the Sherman Act which prohibits restraints of trade. This prohibition has many times been held to be directed against action having the effect of restraining competition, and the Court of Appeals was clearly right in holding that action to control resale prices which does not restrain competition does not restrain "trade" within the meaning of the Act.

ARGUMENT.

I.

In Holding That Evidence of Combination or Conspiracy Was Insufficient to Support the Verdict, the Court of Appeals Following Established Techniques of Judicial Review and Was Clearly Right.

Error of the Court of Appeals in its appraisal of the sufficiency of the evidence, if it existed, would scarcely warrant certiorari. *Southern Power Company* v. *Public Service Company* (1924), 263 U. S. 508. *General Pictures Company* v. *Electric Company* (1938), 304 U. S. 175. However, the decision on this point is clearly right.

There is no direct contradiction of the testimony of Fischel (R. 201-202) and Wachtel (R. 230) that the Seagram and Calvert "hold the line" policies were separately conceived, and the decisions to withhold shipments to Indiana, to avoid risk of participation in the illegal conspiracy of Indiana wholesalers, were separately made. (R. 204-205, 228.)

To support the jury verdict set aside by the Court of Appeals, petitioner relies upon (1) the financial relationship between Seagram and Calvert, (2) identical price policies simultaneously enforced, (3) "conferences" between officials of the various respondents, subsequent to the adoption of the policies, (4) delay by Calvert sales executives subordinate to Wachtel in announcing to petitioner the withholding policy already applied to others in Indiana, (5) alleged statements of Calvert sales executives that "we have to go along with Seagrams" or "with the other side of the house."

The complete integration (not mere "financial" relationship) of the United States subsidiaries of Distillers Corporation Seagram, Ltd., through the respondent Seagram's of Indiana, is not of itself a combination unlawful under Section 1 of the Sherman Act.[4] As factual evidence of conspiracy this proves too much, since neither Distillers Corporation Seagram, Ltd., nor Seagram's of Indiana would be "conspiring" to adopt and enforce a sales policy for its own operations whether conducted through direct subordinates or wholly owned subsidiaries. (The complaint does not charge a conspiracy between respondents and Indiana dealers.)

Simultaneous identical action by two actors is not enough to prove conspiracy, absent evidence that it resulted from express or tacit agreement rather than separate reaction to similar circumstances.[5] "Conferences" between the alleged conspirators are not enough.[6]

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4. "* * * vertical integration, as such, without more, cannot be held violative of the Sherman Act." *U. S.* v. *Columbia Steel Co.* (1948), 334 U. S. 495, 525.

5. In *Johnson* v. *J. H. Yost Lumber Co.* (C. C. A. 8, 1941), 117 F. 2d 53, 61, the court upheld direction of a verdict in a conspiracy case where simultaneous identical action under similar circumstances was the principal "circumstance" relied upon. The court said:

> "There must be substantial evidence furnishing some basis from which the alleged fact of such an agreement may reasonably be inferred. A fraudulent conspiracy may be shown by circumstantial evidence, but the facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion."

The eight competing distributors in *Interstate Circuit* v. *U. S.* (1939), 306 U. S. 208, each accepted a proposal made to all jointly, a conspiracy analogous to the separate signatures to a "round robin." This does not support petitioner's case here.

6. "In the instant action there is no evidence of conspiracy. Each of the defendants was a separate and independent financial institution dealing in automobile paper purchased from or pledged by the plaintiff. The mere fact that consultations were held by representatives of these two defendants relative to the status of plaintiff's account and that they acted at approximately the same

The "conferences" relied upon here took place *after* November 6th (R. 379, 383, 392), and after the "hold the line" decisions, and the decisions withholding Indiana shipments, had been made. (R. 233, 235.)

To infer combination, or the result of Seagram pressure, from Calvert's delay in breaking off negotiation for petitioner's new Calvert distributorship, after Calvert shipments to Indiana had ceased, is to make a wholly improbable guess as against more probable causes, one of which is supported by other evidence. Petitioner had never received Calvert merchandise, had itself asked deferred shipment of a previous order, and as yet there had been nothing to withhold. (R. 223, 224.) Schwalb continued negotiation for future shipments because he did not know when Indiana shipments would be resumed. (R. 221.)

If it is to be assumed that Schwalb (R. 81), Gollin and Tarpey (R. 82) gave the alleged assurances that the price change and the Seagram situation "would make no difference" because *they* thought that petitioner was to be permitted to make the resale price increases already denied to other Indiana wholesalers, this evidences *their* lack of knowledge of any contrary agreement with Seagram; disproof, rather than proof, of conspiracy. Certainly Wachtel, who had conceived the Calvert "hold the line policy," and its implementation, had not yet found it necessary to break with a prospective outlet, but this has no tendency to prove that the action subsequently taken was due to Seagram rather than to the separately conceived policy already operative against others.

Finally, the alleged "going along with Seagram" utter-

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time to protect their respective interests because of duplication of securities does not warrant the inference of plaintiff that a conspiracy existed to injure his business, as charged in the complaint. The charge of conspiracy must be based upon something more substantial than suspicion."

Keller v. *Commercial Credit Co.* (1935), 149 Ore. 372, 376, 40 P. 2d 1018, 1021, 96 A. L. R. 1235, 1238.

ances of Schwalb and Reznik, if given their full hearsay relevancy, are merely descriptive of the Calvert decision as being identical with Seagram's and have no tendency to prove that it was due to Seagram compulsion or agreement. Schwalb and Reznik, as Calvert subordinates of Wachtel, *had* to follow Wachtel's directions, and Wachtel, not Seagram, made the Calvert policy. (R. 228, 232.)

All of this so-called evidence of "conspiracy" scarcely arises to the dignity of suspicion. *Absence* of combination is equally inferrable from each separate circumstance or their combination. "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover * * *." *Pennsylvania Railroad Co.* v. *Chamberlain* (1933), 288 U. S. 333, 339.

II.

The Court of Appeals Has Correctly Decided That Action by Sellers to Promote Resale Competition in Their Merchandise by Placing a Ceiling on Resale Prices is Not Restraint of Trade Under Section 1 of the Sherman Act.

The "restraint of trade or commerce" condemned by the Sherman Act is not accomplished merely by obstruction or prevention of interstate shipments. The "restraints" condemned are those directed to control of the market by suppression of competition in marketing. "The end sought was the prevention of restraints to free competition * * * which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services." "The history of the Sherman Act as contained in the legislative proceedings is

emphatic in its support for the conclusion that 'business competition' was the problem considered and that the Act was designed to prevent restraints of trade which had a significant effect on such competition." *Apex Hosiery Co. v. Leader* (1940), 310 U. S. 469, 493, and note 15 p. 493.

Petitioner's authorities, *Dr. Miles Medical Company v. John D. Park and Sons* (1911), 220 U. S. 373; *United States v. A. Schrader's Son, Inc.* (1920), 252 U. S. 85; *United States v. Trenton Potteries* (1927), 273 U. S. 392; and *United States v. Socony Vacuum Oil Company* (1940), 310 U. S. 150; all exhibit sellers' action calculated to restrain sellers' *competition* by raising, or placing a floor under sellers' prices. The Dr. Miles' scheme constituted illegal restraint because it destroyed competition between dealers.[7] The Schrader device was condemned not merely because "designed to take away dealers' control of their own affairs," but because by so doing it "thereby" destroyed competition.[8]

The Socony conspiracy placed a "floor" under the market, which curtailed competition.[9] Restriction of competition was also the decisive factor in the Trenton Potteries case.[10] The rule that pricing which restrains competition is *per se* a restraint of trade, is not "limited" by recognition that pricing which *promotes* competition is *not* a restraint of trade.

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7. "But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void."

Dr. Miles Medical Co. v. Park & Sons Co. (1911), 220 U. S. 373, 408.

8. "* * * The parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition * * *."

United States v. A. Schrader's Son, Inc. (1920), 252 U. S. 85, 99, 100.

9. *United States v. Socony Vacuum Oil Company* (1940), 310 U. S. 150, 220.

10. *United States v. Trenton Potteries Company, et al.* (1927), 273 U. S. 392, 395.

In the instant case, respondent's action in attempting to place a *ceiling*, not a floor, upon resale prices, was calculated to promote, not to restrain, sellers' competition. It was calculated to lower, not to raise prices; to benefit, not to harm, the consuming public. The supposed injury to petitioner and the liquor wholesaling "public", if existent, results from competition, not only not condemned, but on the contrary protected, by the Sherman Act. Hence the Court of Appeals properly held that the record exhibited no restraint of trade or commerce within the meaning of the anti-trust laws.

Petitioner's "Reasons for Granting the Writ" Misstate Both the Tenor and Effect of the Decision Below.

The Court of Appeals has not decided "that a combination to fix and coerce resale prices at temporarily lower levels than would result from a competitive market is not in violation of the anti-trust laws" (Petition for Certiorari, p. 10), but only that a combination of sellers to secure observance of maximum resale prices is not without more, a restraint of trade within Section 1 of the Sherman Act. No combination to "fix" or "coerce" prices at levels "lower than would result from a competitive market" was shown, but on the contrary the respondents (even if assumed to have acted in combination) acted to *make* their products *competitive* in the resale market, not in restraint of competition.

The Court's decision is only novel by reason of the novelty of petitioner's assertion that respondents' attempt to procure competitive resale prices and to *promote* resale trade by competition was by some abracadabra made "restraint" by reason of the fact that it dealt with prices. The so-called "fixing" of resale price has heretofore been condemned solely because of the suppression of competition between re-sellers with consequent enhancement of

consumer prices. To decide that action calculated to promote competition is not restraint and that lower prices are not to the consumer's detriment, does not substitute "the judgment of the court as to the consumer's interest, for the free market place." It merely refuses to apply the prohibition of restraint to that which is not restraint. That such competition may damage resale merchants by "squeezing" their margins, is a result of permitted competition, not restraint, and is irrelevant to consideration of whether or not "restraint", in violation of Section 1, exists or was attempted.

The so-called "private" O. P. A., conjured by petitioner from the decision of the Court of Appeals, bears no resemblance to its alleged prototype, since that institution restrained buyers' competition for sellers' goods, while the decision of the Court of Appeals merely recognizes the obvious; that to encourage and demand sellers' competition for a buyers' market is not a restraint of trade.

Nor does the decision legalize any "control" of "fixing" of prices requiring consideration of economic effects, except effects wholly outside the purview of the Sherman Act. Wholesalers were in no sense asked to sell at a *fixed* price; they were asked not to exceed a ceiling price. The imaginary economic evils which petitioner conjures from such "control" even if they existed, are not remediable as restraints of trade under the Sherman Act, because resulting not from restraint, but from promotion of resale competition by a device which, however novel, has never before been asserted to be unlawful. The effect of Section 1 of the Sherman Act is to forbid combination in restraint of *competition*,[11] which is all that has been decided.

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11. *Apex Hosiery Co.* v. *Leader* (1940), 310 U. S. 469, 493, and note 15 p. 493.
United States v. *Frankfort Distilleries* (1945), 324 U. S. 293, 294, 296.

Conclusion.

Since the Court of Appeals has correctly held that the evidence does not support the charge of "combination" contained in the complaint, and that the combination asserted, even if proved, was not in "restraint of trade or commerce", the petition for certiorari should be denied.

Respectfully submitted,

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JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petitioner's brief.

QUESTIONS PRESENTED.

1. Whether combination of competing sellers to enforce *maximum* resale prices for their products shipped in interstate commerce is a combination in restraint of trade or commerce within the meaning of the first sentence of Section 1 of the Sherman Act. Act July 2, 1890, C. 647, Sec. 1, 26 Stat. 209, as amended Aug. 17, 1937, C. 690 Tit. VIII, 50 Stat. 693; U. S. C. A. T. 15 Sec. 1.

2. Whether the Court of Appeals erred in holding that evidence of combination or conspiracy was insufficient to support the jury's verdict.

(If, but only if, this Court should determine upon reversal of the Court of Appeals) 3. Whether or not other errors assigned but not considered by the Court of Appeals nevertheless require reversal of the judgment of the District Court.

STATUTES INVOLVED.

The following federal statutes are involved in consideration of the questions sought to be presented by petitioner:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, * * *."

Act July 2, 1890, C. 647, Sec. 1, 26 Stat. 209, as amended Aug. 17, 1937, C. 690 Tit. VIII. 50 Stat. 693; U. S. C. A. T. 15, Sec. 1.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Act Oct. 15, 1914, c. 323, sec. 4, 38 Stat. 731; U. S. C. A. T. 15, Sec. 15.

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition

may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.''

Act Oct. 15, 1914, c. 323, sec. 7, 38 Stat. 731; U. S. C. A. T. 15, sec. 18.

The following Indiana Statutes are involved:

''Every scheme, design, understanding, contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce * * * is hereby declared to be illegal, * * *. Every person who shall make any such contract or engage in any such combination or conspiracy, or enter into any such scheme, design or understanding, * * * shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in any sum not exceeding five thousand dollars ($5,000), to which may be added imprisonment in the county jail or workhouse for a term not exceeding one (1) year, in the discretion of the court or jury trying the cause; * * *.''

Indiana Acts 1907, Ch. 243, sec. 1, p. 490; 5 Burns Ind. Stat. 1933, sec. 23-116.

''No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the state of Indiana by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.''

Indiana Acts 1937, Ch. 17, sec. 2, p. 53; 11 Burns Ind. Stat. 1933, sec. 66-302.

STATEMENT OF THE CASE.

Petitioner's complaint alleged that respondent Joseph E. Seagram & Sons, Inc., an Indiana corporation, had, on April 9, 1945, acquired all the stock of Calvert Distilling Company, with the effect of lessening competition between itself and Calvert, in violation of Section 7 of the Clayton Act. (R. 9.) It also alleged that following termination of O. P. A. liquor control, and after petitioner and other Indiana wholesalers had filed identical price increase schedules with the Indiana Alcoholic Beverage Commission, Seagram determined not to permit an increase in the resale price of its products; that by unlawful combination with Calvert, Seagram sought to withhold liquor from wholesalers who would not follow this resale price policy (R. 11); that by means of the influence resulting from such unlawful stock acquisition, Seagram did induce Calvert to enter into such combination (R. 14-15), and that as a result thereof and as a result of such stock acquisition petitioner was deprived of the respondent's liquor to its damage, etc. (R. 16.)

Respondents' answer denied that such stock acquisition lessened competition, denied any combination or conspiracy between respondents (R. 17-23), alleged affirmatively that the resale price increase was the result of a combination and conspiracy between petitioner and other Indiana wholesalers, and alleged that liquor was withheld from all Indiana wholesalers, including petitioner, to avoid participating in and aiding such illegal conspiracy, and to avoid the damage to respondents' trade-marks and good will which would have resulted from participation or acquiescence therein. (R. 23, 24.)

The case was tried to a jury (R. 28-29), under a charge to which respondents took numerous exceptions (R. 269,

270, 271, 272) and after 22 hours deliberation (noon, May 23—10 A. M., May 24, R. 273-279), followed by a sharp admonition to return a verdict (R. 276) and further deliberation of 2 hours (12:35, R. 279), the jury returned a verdict for $325,000.

Petitioner is a wholesale drug and liquor dealer at Indianapolis, Indiana, and prior to November, 1946, was a distributor of the products manufactured and sold by the Seagram respondents. (R. 16, 20.) Subsequent to October 21, 1946, petitioner made tentative arrangements, never consummated, to become a distributor of the products of the Calvert respondents. (R. 38, 108.)

Respondents, at all times material, have, directly or indirectly, been the wholly owned subsidiaries of Distillers Corporation Seagram, Ltd., a Canadian corporation, which owns all the stock of respondent Joseph E. Seagram & Sons, Inc. Since 1945 the latter corporation, which manufactures distilled spirits, has owned all the stock of Seagram Distillers Corporation and of Calvert Distilling Co. The latter, also a manufacturer, owns all the stock of Calvert Distillers Corporation. Seagram Distillers Corporation and Calvert Distillers Corporation are respectively the sellers and distributors of the products of their immediate parents. (R. 280-281.)

Prior to April 9, 1945, the entire stock of Calvert Distilling Company had been held by Distillers Corporation Seagrams, Ltd., which also held the entire stock of Joseph E. Seagram & Sons, Inc., and the allegedly unlawful acquisition of Calvert stock by the latter was the result of transfer of the Calvert stock from the parent to another wholly owned subsidiary. (R. 8, 9, 18.) Uncontradicted proof showed that this stock acquisition had no effect on competition; that operating control of the Calvert companies remained unchanged. (R. 151-2.) Nevertheless, the trial court refused to withdraw the issue of Clayton Act

violation from the jury (Defendants refused request #3, R. 354, exception to refusal R. 269), and both during the reception of evidence (R. 209, 210, 227, 233, 234) and in the charge (R. 262) commented adversely upon its effect and called attention to its importance. The court's charge also defined conspiracy as an "agreement * * * to accomplish a lawful object by unlawful means" (R. 266) and authorized recovery by petitioner if the jury should find the conspiracy "alleged" or "charged" "in the complaint." (R. 266, 267, 268.)

When O. P. A. liquor price control terminated in October, 1946, Fischel, sales executive of Seagram, determined not to raise prices and to ask all dealers to conform. (R. 201-202.) Wachtel, Calvert President, made like determination. (R. 230.) These decisions were reached separately, and not discussed between the companies until subsequent to November 6, 1946. (R. 232, 235.) The Seagram policy was announced to all wholesalers by telegram November 6, 1946. (R. 393.) Calvert also made public announcement in the press.[1] (R. 230, 246.)

Conspiracy of Indiana Wholesalers.

The Indiana Wholesale Liquor Dealers Association included every such wholesaler in Indiana. (R. 155.) This Association held a meeting October 31, 1946 (R. 157) at which all but one of the members was represented. (R. 158.) Price changes made possible by the termination of O. P. A. control were openly discussed at that meeting, particularly by petitioner's President, G. Barrett Moxley, and by a representative of the Indiana Alcoholic Beverage Commission, and by counsel for one of the wholesalers. (R. 49, 60-66.) At this meeting Moxley announced peti-

(1) The Court of Appeals is in error in asserting that, "No policy was ever announced by Calvert other than that it would follow the Seagram policy." (R. 409.)

tioner's intention of adopting a 15% over-all markup (R. 48) which was apparently unaniniously accepted by all present.

About November 1, 1946, immediately following the October 31 meeting, practically all Indiana liquor wholesalers, including petitioner (R. 308), filed simultaneous notifications of identical resale price increases (15% over-all markup) with the Indiana Alcoholic Beverage Commission. (Defts.' Exs. 1-22, inc., R. 299-322, introduced, R. 163, 164, 165.)

Petitioner's liquor buyer Lutz told Bernbach, Seagram representative, that all distributors had agreed at the October 31 meeting to file a new and increased price schedule. (R. 194.) Offers to prove similar declarations by other Indiana wholesalers were excluded. (R. 191, 194, 195.)

Upon learning of the action of the Indiana wholesalers Fischel, for Seagram ordered Indiana shipments discontinued. (R. 204, 205.) Wachtel, for Calvert, did likewise. (R. 228.) Both took this action to avoid complicity in an illegal conspiracy of Indiana wholesalers. (R. 204, 228.) Both respondent sales companies and Fischel, individually, had been convicted for participation in a similar conspiracy of Colorado wholesalers. (Defts.' Exs. 23, 24, R. 324, 341, 342, 346; introduced, R. 213.) Seagram advised all Indiana distributors that no more shipments would be made until they "went along with our program," to "hold the line" on prices. (R. 196.) Calvert shipments to Indiana ceased at "the end of the first week or the beginning of the second week "in November, 1946." (R. 221.) "Conferences" between Seagram and Calvert officials concerning this action were held after, but not before the decisions were made. (R. 379, 383, 391, 392, 232, 235, 246.)

Schwalb, Calvert's Central Division Manager, in person, and Gollin, Assistant Sales Manager, by telephone, continued negotiation as to petitioner's new Calvert distributorship, through November 12, 1946. (R. 97.) Schwalb made detailed arrangement for petitioner to become a Calvert distributor after cessation of Calvert Indiana shipments because he "did not know when we would start shipments, a week, two weeks, three weeks, three months." (R. 221.) Petitioner had never received any Calvert merchandise, and itself had requested deferred shipment of an order already placed. (R. 223, 224.) November 19, 1946, Schwalb notified Moxley, petitioner's President, that the order would be cancelled. (R. 217-218.) Moxley testified that this notice was accompanied by the statement that "we have to go along with Seagram" (R. 40), and that Calvert's general sales manager, Reznik, gave as a reason that they "had to go along with the other side of the house." (R. 41.) Schwalb and Reznik corroborated the refusal but denied the reason given. (R. 218, 240.) Wachtel had determined the Calvert "hold the line policy," not Gollin Reznik or Schwalb. (R. 228.)

SUMMARY OF ARGUMENT.

I. The Court of Appeals Correctly Decided That There Was Insufficient Evidence of Illegal Conspiracy or Combination to Support the Jury's Verdict.

The combination alleged was one between the respondents only—not between respondents and dealers. Direct evidence shows that the substantially identical Calvert and Seagram policies were separately conceived and announced and their implementation by withholding shipments from Indiana dealers engaged in a price-fixing conspiracy separately determined.

All the circumstances relied upon to establish a conspiracy in the face of this direct evidence to the contrary are at least equally susceptible of a contrary inference and are insufficient to give rise to more than suspicion. Respondents' corporate affiliation is more cogent to disprove unlawful collusion than to support it. Neither the substantial identity of action, nor the "conferences" (exchange of information) between respondents amount to evidence of conspiracy. The delay in announcing final refusal to consummate petitioner's proposed Calvert distributorship is more logically attributable to lack of administrative co-ordination, or to hope of early peace with Indiana wholesalers, than to combination with Seagram; and moreover shows lack of previous agreement rather than combination. The so-called "admissions" of Calvert representatives only describe the action taken, and do not assert or tend to prove combination with Seagram.

The substantial evidence required to sustain a jury verdict must consist of more than suspicion. Here the most that can be found are circumstances all equally susceptible

of contrary inferences; hence petitioner having the burden of proof, must fail.

II. The Court of Appeals Has Correctly Decided That Action by Sellers to Promote Resale Competition in Their Merchandise by Placing a Ceiling on Resale Prices is Not Restraint of Trade Under Section 1 of the Sherman Act.

The alleged combination here in question does not exhibit any of the features heretofore held to violate Section 1 of the Sherman Act.

The "restraint of trade or commerce" condemned by the Sherman Act must restrain competition. The alleged "restraint" here present was not a "restraint" of competition but the reverse. It is not condemned by decisions that condemn "price-fixing" in restraint of competition. It was pricing to promote competition, and its legality does not require an appeal to the "reasonable restraint" doctrine. Respondents did not "fix" an absolute price but on the contrary acted to fix a price ceiling on their own sellers' market. The supposedly undesirable economic results claimed to result do not establish violation of the Sherman Act. Such results flow from competition, which the Sherman Act is designed to preserve. The fact that action by *buyers* to depress prices restrains competition does not prove that *sellers'* action to depress prices is restraint of trade, but the reverse. Price competition in aid of monopoly is not here involved. Since respondents' action has been to promote rather than to suppress competition, they have not violated section 1, whether acting singly or in combination.

III. Prejudicial Errors Committeed by the Trial Court Require Reversal of Its Judgment, Regardless of the Disposition of the Questions Presented in the Petition for Certiorari.

The alleged violation of Section 7 of the Clayton Act was supported by no evidence, and failure to withdraw this issue from the jury was erroneous both under the practice of Federal Courts and the courts of Indiana. This refusal was highly prejudicial, not only because it left the jury free to find a section 7 violation but also because the Clayton Act violation was alleged as a means of accomplishing the section 1 violation, and the jury may, and probably did, convict respondents upon the basis of the admitted stock acquisition, admittedly an innocent transaction.

The illegal conspiracy of Indiana wholesalers alleged in the answer was established by substantial evidence, and the trial court erred in charging that this, even if established, constituted no defense. Respondents had justifiably refused Indiana shipments to avoid participation in this illegal enterprise, and were not guilty of "restraint of trade" in so doing whether acting separately or in combination. Moreover the damages alleged consisted of the profits lost by reason of deprivation of merchandise which petitioner proposed to resell in violation of the anti-trust laws of the State and nation, and were not recoverable under the civil damage section of the anti-trust law, which protects only legal business.

The trial court also erred in admitting evidence relevant only to show respondents' wealth and great size since punitive damages were not recoverable and evidence relevant only to the issue of punitive damages was obviously highly prejudicial. The trial court also erred in ad-

mitting auditors' calculations based upon books and records not in evidence and not produced and in permitting a witness to guess at the proportionate part of petitioner's lost profits attributable to loss of respondents' merchandise.

ARGUMENT.

I. The Court of Appeals Correctly Decided That There Was Insufficient Evidence of Illegal Conspiracy or Combination to Support the Jury's Verdict.

The complaint alleged a combination or conspiracy between the named respondents (R. 14), not between the respondents, or any of them and any wholesaler or wholesalers.

No matter how thinly sliced, or in how many pieces, or in what order reassembled, the very simple factual picture shown by the record is this:

At the termination of O. P. A. price controls on liquor, Fischel, chief sales executive of Seagram, and Wachtel, President of Calvert, *separately* determined *not* to increase existing prices on their products, and to ask all retailers and wholesalers to do likewise. (R. 201-202, 230, 232, 235.) The Seagram decision was announced by telegram of November 6, 1946, to all wholesalers. (R. 393.) The Calvert policy was published in the press. (R. 230, 246.) Almost simultaneously, each learned that Indiana wholesalers, in apparent concert of action had filed and announced *identical* price *increases* on all alcoholic beverages; and each ordered further shipments to Indiana wholesalers discontinued. (R. 204-205, 228.) Petitioner, previously a Seagram distributor, was advised that no more Seagram products would be shipped until it "went along with our program" to "hold the line" on prices. (R. 196.) Petitioner had never received any Calvert products and itself had requested deferred shipment of the only Calvert products previously ordered. (R. 223, 224.) Until after November 13, petitioner continued negotiations with Schwalb,

Calvert's western division manager, in person (R. 97), and possibly with Gollin, sales manager, by telephone (R. 97, but cf. R. 226, 227), for the sale of Calvert products to petitioner. (R. 97, 226.) Schwalb continued these negotiations after all Indiana shipments had been stopped because he "did not know when we would start shipments, a week, two weeks, three weeks, three months." (R. 221.) November 19, Schwalb notified petitioner that petitioner's order would be cancelled, saying, according to Moxley, that "we have to go along with Seagram." (R. 40.) Moxley ascribed similar language to Reznick, viz., "he had to go along with the other side of the house." (R. 41.)

Seagram and Calvert officials "conferred" with respect to the "delivery or non-delivery of Calvert products to plaintiff and Indiana wholesalers" between November 6, 1946, and February 3, 1947. (R. 379, 391, 392.) These conferences were had after, not before, cessation of Indiana shipments had been determined by both. (R. 232, 235, 246.)

The sum and substance of the whole is that under similar circumstances, with respect to a similar situation, two respondents took substantially identical action with respect to Indiana liquor wholesalers, including petitioner. This is not sufficient evidence of conspiracy.[2]

The nine circumstances relied upon by petitioner, listed on pages 19 and 20 of petitioner's brief, in so far as they accord with record facts, afford no inference of conspiracy.

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(2) In *Johnson* v. *J. H. Yost Lumber Co.* (C. C. A. 8, 1941), 117 F. 2d 53, 61, the court upheld direction of a verdict in a conspiracy case where simultaneous identical action under similar circumstances was the principal "circumstance" relied upon. The court said:

> "There must be substantial evidence furnishing some basis from which the alleged fact of such an agreement may reasonably be inferred. A fraudulent conspiracy may be shown by circumstantial evidence, but the facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion."

(1) That the respondents are bound by "close corporate affiliation" is a curious understatement. Three of the corporate respondents are wholly owned subsidiaries of the fourth, which in turn is the wholly owned subsidiary of a fifth not joined. Such "affiliation" is not of itself an unlawful combination (*U. S.* v. *Columbia Steel Co.* (1948), 334 U. S. 495, 525), and identical action by the right and left arms of such an entity is more logically ascribable to the probability of identical thinking by identical twins rather than to *unlawful* concert between parts only nominally separate. Certainly the "affiliation", as well as the common occupancy of a single building, show at most opportunity to conspire, not combination in fact.

(2) "That Seagram determined to fix resale prices at previous O. P. A. levels and punished the petitioner for refusing to adhere to its policy by suspending shipments", also described the action taken by Calvert with respect to all of its Indiana wholesalers. Calvert had already imposed like "punishment" upon all its Indiana wholesalers. That the Calvert ax later fell upon petitioner has no tendency to suggest that combination with Seagram was responsible rather than the separately conceived Calvert policy previously effective against others.

(3) "That Calvert, admittedly a Seagram competitor, and aware of the Seagram policy, determined to expand its distribution in Indiana through petitioner, without any control over resale prices;" distorts the record. Testimony that *Schwalb* determined to expand Calvert distribution without control of resale prices does not establish that *Calvert* so determined, since Wachtel *determined* the Calvert policy. Wachtel had previously determined to suspend shipments to *all* Indiana wholesalers engaged in a collusive effort to advance prices. (R. 228, 231.) There is no evidence that he had determined to except petitioner. Furthermore, even if *Calvert* changed its mind, to ascribe

such change to *conspiracy,* rather than its own independent thinking, is pure speculation.

(4) That "conferences" were held with reference to supplying petitioner (as well as other Indiana wholesalers) does not afford basis for inference that the identical action *previously determined* (R. 232, 235, 246), was perpetuated by conspiracy.[3]

(5) "That Calvert over-night reversed its attitude toward the petitioner and refused shipments" is not true. As pointed out, Wachtel, not Schwalb, was "Calvert" with respect to the decision not to implement the Indiana wholesalers' conspiracy with Calvert merchandise; and there is no scintilla of proof that Wachtel "reversed" his attitude. Moreover, change of policy does not suggest combination, absent evidence that Seagram was responsible. Assuming a "reversal", contemplation of the commercial effect of supplying a new distributor, also guilty of the practice for which old ones were suspended, may more logically be inferred than conspiracy.

(6) "That Seagram and Calvert (but no other distillers) made identical resale price demands," and took identical action to implement this policy, is again a repetition of the identity of action theory, and nothing more.

(7) "That Seagram and Calvert in an identical manner terminated petitioner's distributorship," etc., exhibits

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(3) "In the instant action there is no evidence of conspiracy. Each of the defendants was a separate and independent financial institution dealing in automobile paper purchased from or pledged by the plaintiff. The mere fact that consultations were held by representatives of these two defendants relative to the status of plaintiff's account and that they acted at approximately the same time to protect their respective interests because of duplication of securities does not warrant the inference of plaintiff that a conspiracy existed to injure his business, as charged in the complaint. The charge of conspiracy must be based upon something more substantial than suspicion."

Keller v. *Commercial Credit Co.* (1935), 149 Ore. 372, 376, 40 P. 2d 1018, 1021, 96 A. L. R. 1235, 1238.

again the identity of action argument, although with strangely inconsistent inaccuracy. Petitioner was not "terminated" as a Calvert distributor since it was never "initiated"; and the absence of complete identity of manner, in that Calvert delayed about two weeks in breaking with petitioner, is elsewhere urged as indicating collusion.

(8) That "Calvert told petitioner that * * * 'it had to go along with Seagrams, the other side of the house' * * *", if given full hearsay relevancy against Seagram, serves merely to describe the action being taken.[4] This is not an assertion, and affords no basis for an inference, that such action was the result of combination with Seagram rather than Calvert's independent adoption of an identical policy. Calvert had been "going along with Seagram" with respect to other Indiana wholesalers. That petitioner may have had contrary hope with respect to itself has no tendency to suggest that the blasting of that hope was the result of combination.

The chain of reasoning by which petitioner seeks to support an inference of conspiracy from this evidence is, briefly, that because Seagram and Calvert had motive and opportunity to combine, and took identical action, therefore the identical action resulted from combination. Strangely enough, it is also strenuously argued that Calvert had motive *not to combine*, in that it might through petitioner have taken away from its twin a part of Sea-

(4) The lack of probative force in this hearsay evidence makes it seem unnecessary to discuss its admissability against Seagram defendants. However, the Court of Appeals was clearly right in stating that it was not proof against Seagram. (R. 405-406.) Since admissable against Calvert, *separate* objection by the Seagram defendants would have been wholly unavailing in Indiana. *Young* v. *State* (1923), 194 Ind. 345, 350. The sole remedy was a limiting instruction. It was scarcely necessary, in twice moving for a directed verdict (R. 149, 269, 354) also to request the trial judge to *instruct himself* to disregard hearsay properly admitted against Calvert, but wholly inadmissable against Seagram, absent other proof of conspiracy.

gram's Indiana market. Of course, it is also clear that both respondents separately had "motive" to expand their distribution when competitors' prices were rising, by keeping their consumer prices highly competitive at the old O. P. A. level, and that this "motive" is sufficient to account for the identical action taken.

The fact that "conspiracy" like intent, is often difficult to establish by the direct testimony of observers or participants has not as yet, we believe, given conspiracy complainants such a preferred position that they may substitute for logical proof mere guess and speculation.[6] To guess a cause from an effect is no more permissible than to guess an effect to be the result of a cause.

Concerning the latter this Court has said:

> "But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer. * * *"
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> *Atchison, Topeka & Santa Fe Ry.* v. *Toops* (1930), 281 U. S. 351, 354-5.

On this record every single circumstance relied upon to show "conspiracy" may, with equal if not superior logic, be made the basis of an opposite inference. "We, there-

(6) The language in *Interstate Circuit* v. *United States* (1939), 306 U. S. 208, 221, cited by petitioner (brief p. 24), was applied, not merely to "identical action" but to the simultaneous acceptance by eight motion picture distributors of a proposal made jointly to all, without disclosure as to whether or not by mutual agreement. On the present record there was no joint proposal, and further both Seagram and Calvert executives testified that the identical policies were *not* the result of agreement but separately conceived.

fore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover * * *" *Pennsylvania Railroad Co.* v. *Chamberlain* (1933), 288 U. S. 333, 339.

Moreover, even if this court should conclude that there was evidence to support inference of combination among respondents viewed as independent traders, their status as mere instrumentalities of a single manufacturing-merchandizing unit precludes the possibility of any "conspiracy" condemned by the Sherman Act. The respondent companies are all completely controlled and integrated units of a single manufacturing and distributing enterprise, and the fact that these various divisions adopted identical policies of pricing and customer selection could indicate "conspiracy" only in the sense that those executives jointly responsible jointly reached a decision.

It is true that this Court and the Court of Appeals for the Seventh Circuit have held that affiliated corporations may combine in violation of the Sherman Act by agreements coercively restraining trade of third parties or designed to achieve monopoly.

> *U. S.* v. *Yellow Cab Company,* 332 U. S. 218 (1947).
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> *U. S.* v. *Crescent Amusement Co.,* 323 U. S. 173 (1944).
>
> *Schine Chain Theatre, Inc.* v. *U. S.,* 334 U. S. 110 (1948).
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> *U. S.* v. *Griffith,* 334 U. S. 100 (1948).
>
> *U. S* v. *General Motors Corporation,* 121 Fed. 2d 376 (C. C. A. 7, 1941); cert. den. 314 U. S. 618 (1941).
>
> *U. S.* v. *New York Great Atlantic & Pacific Tea Co.,* 173 Fed. 2d 79 (C. A. 7, 1949).

However, this Court has never held that agreements among wholly owned subsidiary corporations of the same parent or parallel action by such subsidiaries with respect to a voluntary act of restraint of trade, such as establishment of maximum prices, constitutes conspiracy under the Sherman Act.

Indeed, when this Court, in *U. S. v. Yellow Cab Company, supra,* discussed the alleged agreement between two of the affiliated corporations not to compete for railroad business, its opinion indicated that the only reason for upholding the charge of actionable conspiracy was that it was alleged that corporate affiliations had been used as a means to carry out a pre-existing conspiracy, stating at page 229:

> "* * * Moreover, the fact that the competition restrained is that between affiliated corporations can not serve to negative the statutory violation where, as here, the affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete."

In addition this Court has indicated that it does not hold illegal all agreements between affiliated corporations which might be illegal if the corporations were not affiliated.

In *U. S. v. Columbia Steel Company,* 334 U. S. 495 (1948) the government relied upon *U. S. v. Yellow Cab Co., supra,* to support the argument that it was illegal *per se* for a manufacturer to pre-empt any market for his goods through vertical integration provided that an appreciable amount of interstate commerce is involved. In holding this argument was not well founded, this Court stated at pages 521-522: "We do not construe our holding in the *Yellow Cab* case to make illegal the acquisition by U. S. Steel of this outlet for its rolled steel without consideration of its effects on the opportunities of other competitor producers to market their rolled steel.

"In discussing the charge in the *Yellow Cab* case we said

that the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act."

Again this Court stated at page 523: "A subsidiary will in all probability deal only with its parent for goods the parent can furnish. That fact, however, does not make the acquisition invalid. Whenever elements of Sherman Act violations are present, the fact of corporate relationship is material and can be considered in the determination whether restraint or attempts to restrain exists."

We submit that the doctrine which this Court has applied with respect to the status of corporate affiliation or integration as a defense to a charge of restraint of trade is that the nature of the restraint, *i.e.*, whether it is of a voluntary nature which merely eliminates competition between the parties, or whether it is of a coercive nature that has an effect upon third parties, is determinative.

It seems clear that this Court must make the distinction which it has made between voluntary and coercive restraints of trade for unless it does so the inevitable result will be that no corporation can have a uniform price policy for its various divisions, as the mere fact of discussion and agreement regarding price by members of the Board of Directors and the various executives of the corporation may otherwise involve a violation of the Sherman Act. (Executives charged with pricing both Buicks and Cadillacs are quite vulnerable.) In addition, a decision by this Court that wholly owned subsidiaries of the same parent corporation may violate the law because of an agreement with respect to prices will sound a death knell to the widespread business practice of doing business through subsidiary companies. If such a drastic result is to be achieved, we submit that it should be taken by the Congress rather than by this Court, as this Court indicated with respect to corporate integration in *U. S.* v. *Columbia Steel Company, supra,* where it stated

at page 526: "If businesses are to be forbidden to enter into different stages of production, that order must come from Congress not the Court."

In addition, a holding that a conspiracy with regard to prices is possible among corporate subsidiaries of the same parent corporation would result in exalting form over substance, which this Court in *U. S.* v. *Yellow Cab Company,* supra,* stated should not be done in enforcing the Sherman Act when it stated at page 227: "That statute (the Sherman Act) is aimed at substance rather than form."

In this type of case the doctrine of single trader is particularly appropriate and necessary to be applied to parent and wholly owned subsidiaries. When the executives controlling the pricing and sales policies of the single unit comprised by these separately named respondent companies determined to act to keep prices down, they were not guilty "conspirators" unless the policy upon which they resolved was itself unlawful.

II. The Court of Appeals Has Correctly Decided That Action by Sellers to Promote Resale Competition in Their Merchandise by Placing a Ceiling on Resale Prices is Not Restraint of Trade Under Section 1 of the Sherman Act.

The alleged combination here in question does not exhibit any of the features heretofore held to violate Section 1 of the Sherman Act. The complaint does not allege a combination to monopolize or an attempt to monopolize or other violation of Section 2 of the Sherman Act.[7] The

*See Adelman "Effective Competition and the Anti-Trust Laws" 61 Harvard Law Review 1289, at page 1317 (1948).

(7) *Swift & Co.* v. *United States*, 196 U. S. 375, 391; *American Tobacco Co.* v. *United States*, 147 F. 2d 93 (C. A. 6).

combination alleged is not a combination of sellers to fix a minimum on their own prices, or upon the resale prices of their goods.[8] It is not alleged that producers have combined with dealers to place a floor under resale prices and restrain competition among dealers.[9] It is not alleged that producers have combined to raise the market price of the products sold by concerted buying programs designed to create an artificial and high market price.[10] *It is alleged* that producers have combined "in restraint of trade" by refusing to deal with wholesalers who refuse to compete in the resale market by observing a *maximum, not* a minimum resale price on the producers' products.[11]

No attempt is made, either in the brief of petitioner or in the brief of *amicus curiae* to resolve this paradox with either the ordinary meaning of the words "restraint of trade," as found in section 1 of the Sherman Act, or with oft repeated judicial definitions of the term.

The "restraint of trade or commerce" condemned by the Sherman Act is not accomplished merely by obstruction or prevention of interstate shipments. The "restraints" condemned are those directed to control of the market by suppression of competition in marketing. "The end sought was the prevention of restraints to free competition * * * which tended to restrict production, raise prices or other-

(8) *United States* v. *Trenton Potteries* (1927), 273 U. S. 392.

(9) *Dr. Miles Medical Co.* v. *Park & Sons Co.* (1911), 220 U. S. 373, 408;
U. S. v. *Frankfort Distilleries* (1945), 324 U. S. 293;
U. S. v. *A. Schrader's Son, Inc.* (1920), 252 U. S. 85.

(10) *U. S.* v. *Socony Vacuum Oil Company* (1940), 310 U. S. 150.

(11) The complaint did not charge and the evidence does not support an inference, that the "fair trade" contracts of 1947 had any connection with the "hold the line" efforts of 1946. Fair trade contracts were made a prerequisite to "price and brand" advertising by regulation of the Indiana Alcoholic Beverage Commission which became effective July 1, 1947, and their purpose was simply to legalize such advertising. R. 214.

wise control the market to the detriment of purchasers or consumers of goods and services." "The history of the Sherman Act as contained in the legislative proceedings is emphatic in its support for the conclusion that 'business competition' was the problem considered and that the Act was designed to prevent restraints of trade which had a significant effect on such competition." *Apex Hosiery Co.* v. *Leader* (1940), 310 U. S. 469, 493, and note 15 p. 493.

Petitioner's authorities, *Dr. Miles Medical Company* v. *John D. Park and Sons* (1911), 220 U. S. 373; *United States* v. *A. Schrader's Son, Inc.* (1920), 252 U. S. 85; *United States* v. *Trenton Potteries* (1927), 273 U. S. 392; and *United States* v. *Socony Vacuum Oil Company* (1940), 310 U. S. 150; all exhibit sellers' action calculated to restrain sellers' *competition* by raising, or placing a floor under sellers' prices. The Dr. Miles' scheme constituted illegal restraint because it destroyed competition between dealers.[12] The Schrader device was condemned not merely because "designed to take away dealers' control of their own affairs," but because by so doing it "thereby" destroyed competition.[13]

The Socony conspiracy placed a "floor" under the market, which curtailed competition.[14] Restriction of competi-

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(12) "But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void."

Dr. Miles Medical Co. v. *Park & Sons Co.* (1911), 220 U. S. 373, 408.

(13) "* * * The parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition. * * *"

United States v. *A. Schrader's Son, Inc.* (1920), 252 U. S. 85, 99, 100.

(14) *United States* v. *Socony Vacuum Oil Company* (1940), 310 U. S. 150, 220.

Defendants in the above case were producer sellers of gasoline whose selling prices were pegged to the spot market, and the indictment charged that they had combined to raise *their own* selling

tion was also the decisive factor in the *Trenton Potteries* case.[15] The rule that pricing which restrains competition is *per se* a restraint of trade, is not "limited" by recognition that pricing which *promotes* competition is *not* a restraint of trade.

In the instant case, respondent's action in attempting to place a *ceiling,* not a floor, upon resale prices, was calculated to promote, not to restrain, sellers' competition. It was calculated to lower, not to raise prices; to benefit, not to harm, the consuming public. The supposed injury to petitioner and the liquor wholesaling "public," if existent, results from competition, not only not condemned, but on the contrary protected, by the Sherman Act. Hence the Court of Appeals properly held that the record exhibited no restraint of trade or commerce within the meaning of the anti-trust laws.

Petitioner's argument to the contrary studiously refrains from pointing out in what manner trade has been "restrained" by any suppression of competition. Reliance is placed wholly upon language of decisions where the facts exhibited suppression of competition by *minimum* prices agreed upon between producers or jobbers, or *minimum* prices enforced upon resellers, with the obvious result of blunting the most effective competitive weapon of sellers,

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prices by a concerted program of buying distress gasoline in the spot market. Hence the pronouncement of the opinion as to illegality of combination to depress or lower prices is dictum as applied to the indictment. However, had the defendants, as *buyers* combined *to depress* the spot market they would have been equally guilty, but not under the indictment returned. The statement of the opinion as applied to a buyer-seller combination is therefore good law since such a combination may restrain trade by "price-fixing" either up or down and to the extent that buyers were competitors for the distress gasoline, depressing the price would restrain competition. But the case is not authority for the proposition that sellers' action to promote competition by a price ceiling is a restraint of trade.

(15) *United States v. Trenton Potteries Company* (1927), 273 U. S. 392, 395.

i. e.—offering more for the same money or the same for less money. The able documentation of the doctrine that prices fixed or agreed upon in restraint of competition are not saved from the proscription of the Sherman Act by their "reasonableness" is simply demolition of a man of straw, since these respondents did not restrain, but *promoted* competition, and their action requires no appeal to the saving doctrine of "reasonableness."

The make weight assertion that what the respondents did was to "fix the absolute resale prices for their products" is an attempt to inject into the case an imaginary "price fixing" arrangement not asserted in the pleadings. Long after respondents had succeeded in their endeavor to keep their consumer prices competitive at former O. P. A. levels, respondents entered into fair trade contracts entirely lawful under the Miller-Tydings amendment.[16] If these suppressed competition it was lawful suppression. It is also contended that the announcement of November 6 (R. 393) that Seagram had decided to maintain former prices on all brands was the "fixing" of a minimum. The annexed appeal to prevent *a price rise,* dispels any such interpretation. Indeed, the Court of Appeals was clearly right in saying that there was no evidence of an attempt to "fix" a price, only to *prevent an increase in price.* (R. 411, 412.)

But the dominant fallacy in petitioner's argument springs from the false assumption that the proscription of "restraint of trade" in some manner guarantees wholesalers from the effects of lawful competition, or that the Sherman Act prohibits methods of competition which restrict middlemen's margins.

Enforcing a resale price ceiling circumscribes the dealer's freedom to exact all that the traffic will bear but it

(16) The Indiana law making "fair-trade" lawful is set out under "Statutes Involved".

does not limit his freedom to compete. Freedom to compete, not freedom from competitive pressure, is the freedom which the Sherman Act guarantees. The restraint on "freedom of trade on the part of dealers" mentioned in *Dr. Miles*, and on "dealers' control of their own affairs" in *Schrader* was the restraint on their *ability to compete* imposed by a price minimum. "Coercion" of dealers to restrain their *competitive* freedom is condemned, not coercion which makes effective competition in their supplier's goods a condition of their continued supply.

This is not to say that "the opportunity of distributors to make profits is unimportant in the competitive system" or otherwise. It is simply to say that Section 1 of the Sherman Act does not inhibit competitive devices, which for the very reason that they promote and do not inhibit competition, do not restrain trade. *Promotion* of competition cannot properly be called "restraint of trade" merely because of the effect of such devices on the middleman, or because of fear of "absentee control of business," or because of the bugaboo of the "large producer dominant in the market." The evils (we believe imaginary) alleged to result to the "competitive system" from the refusal of the Court of Appeals to expand "restraint of trade" to cover that which is obviously not restraint, if they exist, are better to be remedied by Congress or the F. T. C. than by judicial inversion of the language of the Sherman Act.

A more subtle fallacy is exhibited by the brief of the Solicitor General, *Amicus Curiae*. On pages 5-6 it is said:

> "* * * Low prices are not, as such an objective of the statute. This seems apparent if consideration is given to a combination among buyers to depress the price at which they purchase. The Act is designed to permit sellers to dispose of their goods in a market free from combination among buyers to keep prices low, just as it is also designed to permit buyers to purchase in a market free from combination among sellers to enhance or maintain prices."

It is, of course, true that "low prices are not as such, an objective of the statute," nor are high prices. Seller's price competition lowers prices, buyer's price competition raises prices. The "objective of the statute" is to prevent restraints upon the competition of either group, to inhibit combinations of buyers to depress the prices at which they buy, or of sellers to increase the prices at which they sell. But to attempt the above inversion and assert that because buyers who combine to depress prices restrain trade, therefore *sellers* who *depress* prices also restrain trade, is to assert the identity of opposites.

Here it is not alleged that there is a "combination among buyers to depress the price at which they buy," nor that there is "a combination among sellers to enhance or maintain prices." On the contrary, it is absurdly charged that sellers have *restrained* trade by attempting to hold down the prices at which their goods may be sold. Rather than having acted to restrain trade these respondents adopted a highly competitive marketing program to promote the sale of their own goods.[17]

The price depressing combination of live stock *buyers* exhibited in *Swift & Co.* v. *United States*, 196 U. S. 375, 391, and of tobacco *buyers*, condemned in *American Tobacco Co.* v. *United States*, 147 F. 2d 93, were restraints of trade because they suppressed *competition* among *buyers*. While it is obvious that price ceilings restrain buyers' competition, it requires price floors to restrain sellers' competition.

We believe the Solicitor General is in error in asserting the similarity or applicability of the resale price feature

(17) The record indicates the effectiveness of this form of competition. In the face of a more than 30% decline in the liquor business beginning in 1947 (R. 140), respondent Seagram's volume (cases) increased over 30% in 1947, and a further 50% in 1948. R. 391. The Calvert increase, while less, was substantial, particularly in dollars. R. 391.

of the *Tobacco* case to the one here involved. The device there adopted was alternative, 13 cents on defendant's brands or 11 cents on competing 10-cent brands. The latter alternative was clearly a *restraint* on competition with other stores. Moreover, the resale pricing exhibited by the *Tobacco* case was but one of many devices found to have been the instruments of an attempt to achieve illegal monopoly, a violation of Section 2 of the Sherman Act, which is not here involved. The *Tobacco* case does not hold that the resale price program was of itself a restraint of trade.

The present complaint does not charge a violation of the monopoly section of the Sherman Act, nor price ceilings on food products, but nevertheless the Solicitor General argues that to sanction maximum resale pricing might result in confining trade in food products to super markets. Such an argument might be relevant to a charge of *monopolization*, but it has no tendency to establish that resale maximums *restrain* trade.

The present complaint does not charge that respondents combined to maintain (keep up) their own prices, and the evidence shows that their prices were held down, while other distillers advanced. (R. 193, 196.) The argument that resale maximum prices provide "a ready instrumentality for maintaining the sellers' own prices," is therefore inapplicable either to the pleadings or evidence. Respondents did not "maintain" their own prices except to *maintain* the old ceiling in the face of a general advance.

What respondents did "maintain" was an effective competitive position in the post war market. Whether this was the result of control of all respondents by a single parent, of superior wisdom common to sales executives of both groups, of refusal by one to be outdone in price competition by the other, or of the supposed pressure, which only suspicion and no evidence suggests was exerted by

one on the other; the result was not a restraint of competition, but the reverse. It was, therefore, not a violation of the statutory prohibition of "restraint of trade" or commerce.

III. Prejudicial Errors Committed by the Trial Court Require Reversal of Its Judgment, Regardless of the Disposition of the Questions Presented in the Petition for Certiorari.

A. The trial court erred, to the serious prejudice of respondents, in refusing to withdraw from the jury the charge of violation of Section 7 of the Clayton Act.

The complaint charged that the transfer, by Distillers Corporation Seagram, Ltd., of the stock of its wholly owned Calvert subsidiary, to another wholly owned subsidiary, Joseph E. Seagram & Sons, Inc., had lessened competition between the Calvert and Seagram groups in violation of section 7 of the Clayton Act (R. 9), and that this allegedly unlawful stock acquisition had been a means of effectuating an alleged combination in violation of Section 1 of the Sherman Act. (R. 11-12, 14.) Damages were asserted to have resulted, not only from the alleged Section 1 violation, but from "said unlawful acquisition" of stock. (R. 16.)

Essential to establish the Clayton Act violation was evidence that the stock acquisition had "lessened competition" between Seagram and Calvert. *International Shoe Co.* v. *Federal Trade Commission* (1930), 280 U. S. 291. Not only was such evidence wholly absent, but also it affirmatively appeared that operative control and management of the companies was unchanged. (R. 151-152.) The claim of Clayton Act violation was wholly abandoned. (R. 401.)

Respondents duly requested an instruction withdrawing this issue from the jury. (Defendants' request No. 3, R. 354.) Exception to its refusal was taken. (R. 269.)

This refusal was error.

Wilmington Star Mining Co. v. *Fulton* (1907), 205 U. S. 60, 78.

Jarrett v. *Ellis* (1923), 193 Ind. 687, 692.

The error was extremely prejudicial to respondents. No less than six times during the reception of evidence the trial judge took occasion to emphasize the importance and effect of this stock acquisition. (R. 209, 210, 227, 233 (twice), 234.) In the charge given he directed specific attention to the claim that by the stock acquisition Seagram had "gained control of its principal competitor." (R. 262.) The charge defined conspiracy in one aspect as an agreement to attain a lawful object by unlawful means. (R. 266.) The jury were authorized to find for plaintiff and assess damages upon finding the conspiracy "as alleged" (R. 266-267) or "charged in the complaint." (R. 267.) Thus the jury were in effect authorized to find for the plaintiff because of the allegedly unlawful acquisition of the Calvert stock. Probability that one or more did just this is enhanced by the repeated and sinister emphasis placed upon this allegation by the trial judge. Failure to withdraw this issue upon request was therefore highly prejudicial error.

B. The trial court erred in instructing the jury that "it is no defense to this action, even though the plaintiff and the other wholesalers entered into a conspiracy among themselves." (R. 264.) Exception taken. (R. 269.)

The existence of the Indiana wholesalers' conspiracy had been pleaded as a defense (R. 23-25) and had been assigned by Fischel (R. 204) and Wachtel (R. 228) as reason for stopping Indiana shipments.

Ample evidence to warrant the jury in finding that such a conspiracy existed had been introduced. Circumstantially, Moxley's announcement of petitioner's proposed

mark-up at the October 31 wholesalers' meeting (R. 48) followed by the substantially simultaneous and immediate adoption of this identical price change by all others (R. 299-322) was alone sufficient. *Interstate Circuit* v. *United States* (1939), 306 U. S. 208, 226. Moreover, Lutz admitted to Bernbach that the identical pricing was the result of action taken at the October 31 meeting. (R. 194.) The trial court erroneously excluded similar declarations of other co-conspirators. (R. 191, 195.)

There was thus ample evidence that Indiana wholesalers were proposing to market respondents' products in violation of Section 1 of the Sherman Act and the anti-trust law of Indiana.

The existence of the wholesalers' conspiracy *did* constitute a good defense, and the court erred in denying it on at least three grounds.

(1) Wholly apart from the risk of becoming *particeps criminis*, respondents' collection of the price of merchandise furnished to be resold in violation of law would have been jeopardized.

> *Hanauer* v. *Doane* (1870), 12 Wall. 342.
> *Graves* v. *Johnson* (1892), 156 Mass. 211, 30 N. E. 818.

(2) Respondents justifiably withheld previously contracted shipments of goods to be resold in violation of law.

> *Church* v. *Proctor* (C. C. A. 1, 1895), 66 Fed. 240.
> *Foley Mfg. Co.* v. *Sierra Nevada Lumber Co.* (C. C. A. 7, 1909), 172 Fed. 197.

Justifiable refusal to assist the fruition of an illegal conspiracy could not be "restraint of trade" even if respondents *combined* so to refuse.

(3) The "trade" protected by the Sherman Act is lawful "trade", the damages to business to be awarded un-

der the Clayton Act, sec. 4 are damages to legal, not illegal business, and petitioner was not entitled to an award of damages resulting from deprivation of merchandise and loss of profits from resale of merchandise which petitioner proposed to resell in violation of the laws of both state and nation.

> *Maltz* v. *Sax* (C. C. A. 7, 1943), 134 Fed. 2d 2, 5.
> *Moore* v. *Mead Service Co.* (C. A. 10, 1950), 184 F. 2d 338, 340.

C. The trial court committed numerous prejudicial errors in the admission of evidence.

(1) The court erred in admitting over respondent's objection the answers to various interrogatories designed to disclose the wealth and size of respondent corporations, having no relevancy to any issue to be tried, and calculated to prejudice the jury with respect to both substantive issues and damages.

Answers to these interrogatories (Calvert Sales, 8, 9, 10, R. 377, 378; Calvert, 24, R. 384; Seagram Ind., 31, 32, R. 388, and Seagram, Sales, 7, R. 391) were admitted over objection (R. 144, 146, 148), and had no conceivable relevance except to establish the wealth and financial importance of respondents.

Actual damages only were recoverable (*Keough* v. *C. & N. W. Ry. Co.* (1922), 260 U. S. 156, 164) and punitive damages were not to be assessed. *Hansen Packing Co.* v. *Armour & Co.* (D. C. N. Y. 1936), 16 F. Supp. 784, 788. It was therefore prejudicial error to admit evidence relevant only to respondents' ability to pay damages.

> *Washington Gas Light Co.* v. *Lansden* (1899), 172 U. S. 534, 554, 555.

(2) The trial court erred in permitting the witness Barden to give a hypothetical calculation of petitioner's losses by reason of the deprivation of the Seagram and Calvert merchandise, based upon audit of petitioner's books, and Alcoholic Beverage Commission records, when neither the books or records were produced for examination. (R. 119, 120, 121, 122, 123.)

Cabel v. *U. S.* (C. C. A. 1, 1940), 113 F. (2d) 998, 1001.

Pabst Brewing Co. v. *E. Clemens Horst Co.* (*C. C.* A. 9, 1916), 229 F. 913, 918.

Phillips v. *U. S.* (C. C. A. 9, 1912), 201 F. 259, 269.

Hagan Coal Mines, Inc. v. *New State Coal Co.* (C. C. A. 8, 1928), 30 F. (2d) 92.

(3) The trial court erred in permitting the witness Lutz to testify over objection that two-thirds of the petitioner's loss of profits was due to deprivation of Calvert and Seagram merchandise. (R. 139.)

Central Coal & Coke Co. v. *Hartman* (C. C. A. 8, 1901), 111 Fed. 96, 99-102.

U. S. v. *Spaulding* (1934), 293 U. S. 498, 506.

Farris v. *Interstate Circuit* (C. C. A. 5, 1941), 116 F. (2d) 409, 412.

Conclusion.

Respondents submit that the action taken by them, whether viewed as combined or separate, was not a "restraint of trade," and further that there was no evidence of unlawful conspiracy or combination. It is thus confidently expected that there will be no occasion for any court to consider the other errors of the trial court above listed,

which apart from all other questions required reversal of the judgment of the District Court.

Respectfully,

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BRIEF for the U.S. AS AMICUS CURIAE

No. 297

In the Supreme Court of the United States

October Term, 1950

Kiefer-Stewart Company, petitioner

v.

Joseph E. Seagram & Sons, Inc., Seagram-Distillers Corporation, The Calvert Distilling Company and Calvert Distillers Corporation

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INDEX

CITATIONS

Cases:

prices at which their Indiana wholesalers might resell their products and to withhold their products from any Indiana distributor who failed to observe the maximum resale prices fixed by the respondents.

The respondents are Joseph E. Seagram & Sons, Inc., referred to herein as Seagram; Seagram-Distillers Corporation, referred to herein as Seagram Sales; Calvert Distilling Company, referred to herein as Calvert; and Calvert Distillers Corporation, referred to herein as Calvert Sales. Calvert and Seagram Sales are wholly-owned subsidiaries of Seagram, and Calvert Sales is a wholly-owned subsidiary of Calvert. Seagram and Calvert manufacture liquor which they sell and distribute respectively, through Seagram Sales and Calvert Sales.

The jury returned a verdict for the plaintiff but, on appeal, the court below reversed. The grounds for reversal were, first, that the evidence failed to establish that the parallel action of the Seagram respondents and the Calvert respondents had been taken in concert or pursuant to conspiracy (R. 401-409) and, second, that the Sherman Act does not prohibit a conspiracy to fix *maximum* sale or resale prices (R. 409-412). The latter question, involving the scope of the application of the Sherman Act to price-fixing agreements, is obviously of grave concern to the Government. But it also regards the ruling by the court below on the sufficiency of the evidence as presenting an important

issue as to the respective functions of court and jury in passing upon the ultimate fact of conspiracy in the light of the entire body of evidence, particularly where, as here, the evidence relied upon to establish conspiracy is largely circumstantial and consists, in part, of parallel action by the defendants. The Government in its own suits under the Act is not infrequently faced with adverse determinations of this issue. See *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363 (C.A. 8), certiorari denied, 339 U. S. 942.

The Government is therefore presenting its views on the two issues brought before the Court by grant of certiorari. While the sufficiency of the evidence is of interest to the Government only in relation to the general question of invasion of the jury's fact-finding province in cases under the Sherman Act, we believe that our discussion of this question will be more helpful if we deal not merely with general rules of law which are universally acknowledged, but with the specific evidence which may be thought to support the jury's finding of conspiracy.

I

Conspiracies to Fix Maximum Resale Prices Are Per Se in Violation of the Sherman Act

In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 218, decided in 1940, this Court pointed out that it had for over forty years "consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se*

under the Sherman Act." The Court rejected the contention that the Act outlaws only agreements upon specific price. It said (p. 221) that any combination which "tampers with price structures" is engaged in an illegal activity, that the members of a price-fixing group, to the extent that they "raised, *lowered,* or stabilized prices" would be "directly interfering with the free play of market forces," and that the Act "protects that vital part of our economy against any degree of interference." [Italics supplied.]

The interpretation thus placed upon the Act was not casual or inadvertent, but was inherent to the concept of unlawful price fixing on which decision of the case was rested. The view that it was unlawful to agree upon either a floor or a ceiling for prices was twice reiterated. The Court said (p. 222) that "agreements to raise or *lower* prices" are illegal under the Act, and that prices are fixed within its meaning "if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices." [Italics supplied.] Again, the Court said (p. 223) that a combination formed for the purpose and with the effect of "raising, *depressing,* fixing, pegging, or stabilizing the price of a commodity" is illegal *per se* under the Act. [Italics supplied.]

The court below was of the opinion that the agreement to fix maximum resale prices, charged against respondents, was not a price-fixing agreement since the wholesaler was free to sell at any price he saw fit "within the maximum limitation" (R. 410). But an agreement upon either the upper limit of price or its lower limit constitutes control over price through combination. There is agreement upon price notwithstanding the fact that, in the one case, the parties are free to sell at less than the prescribed maximum and, in the other case, at more than the prescribed minimum.

The view of the court below was that an agreement on maximum prices is "neither in restraint of trade nor an impairment of competition" (R. 410). Competition, the court said, consists in the ability to meet or undersell the price fixed by a competitor, and the consumer is benefited and trade is stimulated by the lower prices which result from such competition. The court further concluded that an agreement upon maximum price does not thwart these objectives and is therefore not to be regarded as within the Act's prohibitions.

The purpose of the Sherman Act is to keep trade free from artificial restraints and limitations imposed by combination. In the price field, this means that prices shall find their own level upon the basis of the independent action of both buyers and sellers. Low prices are not, as such, an objective of the statute. This seems apparent if consid-

eration is given to a combination among buyers to depress the price at which they purchase. The Act is designed to permit sellers to dispose of their goods in a market free from combination among buyers to keep prices low, just as it is also designed to permit buyers to purchase in a market free from combination among sellers to enhance or maintain prices.

Swift & Co. v. *United States,* 196 U. S. 375, 391, upheld the validity of a complaint which charged, among other things, that the leading meat packers had conspired to refrain from bidding against each other in the purchase of livestock at public stockyards, thereby compelling the owners of stock to sell at lower prices than they would have received if the bidding had been competitive. Similarly, in *American Tobacco Co.* v. *United States,* 147 F. 2d 93 (C.A. 6) the evidence submitted to the jury in support of the charge of illegal restraint and monopolization of trade consisted, in part, of proof that the leading cigarette manufacturers, in purchasing leaf tobacco at public warehouses, had used tactics similar to those charged in the *Swift* case. In the words of the court (p. 101), the Government charged the defendants with maintaining "price ceilings which, as a result of agreement between them, none exceeds," and this charge was supported by evidence that each of the Big Three gave its buyers instructions as to the prices to be paid for the leaf tobacco to be pur-

chased on each of the various markets, which instructions were "in terms of top prices." [1]

An agreement among a group of sellers dominant in their industry, to fix maximum resale prices for their products, provides a ready instrumentality for maintaining the sellers' own prices while securing the benefit of relatively low resale prices, by squeezing the distributor's margin, i.e., the spread between the distrbiutor's purchase price and his resale price. The agreement upon maximum resale prices charged against the present respondents clearly was of this character. A similar use of power to depress resale price was shown in the *American Tobacco Co.* case, *supra*. There was evidence in that case that certain of the defendants had insisted that their retailers permit no more than a three-cent differential between the retail price of their cigarettes and that of the so-called 10-cent brands and that the retailer should therefore either reduce his price on defendants' cigarettes from 14 cents to 13 cents a pack or raise his price on the 10-cent brands from 10 cents to 11 cents. 147 F. 2d 93, at pp. 105-106.

A decision sanctioning agreements to fix maximum resale price would permit manufacturers to exercise price control over their products after they had passed into the channels of distribution. Trade in food products might, through this means,

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[1] The decision upholding conviction of the defendants was affirmed in 328 U. S. 781 after review limited to questions other than that referred to above.

be confined to supermarkets operating on the basis of large sales volume and low profit margin. Smaller outlets providing additional service or meeting special needs, whether by extending credit to customers, by keeping open long hours, by making deliveries, or by being located close to a small consuming group, could not profitably handle goods on which a maximum resale price, narrowly above purchase price, had been fixed.

We submit that the interpretation placed upon the Act in the *Socony-Vacuum* case is correct and should be reaffirmed.

II

There is Adequate Evidentiary Support for the Jury's Finding of Conspiracy

We shall undertake to marshal, with only minor comment, evidence upon which the jury might have relied in concluding that the respondents conspired with each other to withhold their products from petitioner unless it would yield to their dictates as to maximum resale price.

In 1946 petitioner was one of the leading wholesalers of liquor in Indiana (R. 36) and it had been a distributor of Seagram whiskies continuously since the repeal of prohibition in 1933 (R. 283). On November 1, 1946, petitioner notified the Indiana Alcoholic Beverage Commission of a new price scale which the Commission approved (R. 308). It was higher than that permitted by OPA regulations, which terminated on October 23, 1946 (R.

42-44). On November 6, 1946, Seagram sent a telegram to all of its Indiana wholesalers requesting immediate assurance that they would continue the OPA maximum prices (R. 392-393). To enforce this policy, it cut off all shipments to Indiana wholesalers who failed to continue OPA maximum prices (R. 204).

In the spring of 1942 representatives of Calvert Sales advised petitioner's president that their distribution in Indiana was "wholly unsatisfactory" and that they would like to obtain petitioner as an Indiana distributor (R. 36). Petitioner suggested that the matter be deferred until there was a sufficient supply of Calvert whiskies to make the arrangement worthwhile (R. 36-37, 79, 107).[2] The subject was again taken up in the latter part of October 1946 when petitioner said that it would be glad to become a Calvert distributor provided it could be assured that it would receive from 2,000 to 3,000 cases a month, with deliveries rising to 4,000 cases a month as rapidly as possible. (R. 37-38, 108).

At meetings with officers of petitioner on November 5 and November 11, 1946, these assurances were given and it was agreed that the petitioner would become a distributor of Calvert whiskies (R. 80-81, 108-109). Petitioner was told that its price change on November 1, 1946, would have no

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[2] During the war, distillers had to conserve their stocks because, under orders of the federal Government, only a limited production of whiskey from grain was permitted (R. 282).

effect whatsoever on the shipment of whiskey to it as a Calvert distributor and that Calvert was going through with the distributorship arrangement regardless of what Seagram did in Indiana (R. 81, 108).

At the conference on November 11th plans were made for a sales promotion meeting to be held on November 23d in order "to start off with a big bang" (R. 81). This meeting was to take the form of a hotel luncheon attended by all of petitioner's salesmen and nine of Calvert's New York executives (R. 81-82, 109). Arrangements were made for hotel reservations for Calvert's officers and for a banquet room to accommodate 60 people (R. 82). Calvert Sales also advised petitioner that it had been given an initial allocation of 2,000 cases of whiskey for November and a further allocation of 2,000 cases for December, and on November 13, 1946, petitioner sent Calvert Sales Indiana revenue stamps covering these allocations (R. 284-285).

On November 19, 1946, the Chicago sales manager of Calvert Sales notified petitioner's president by telephone that the arrangement for it to act as a Calvert distributor was at an end and, in explanation of the change in policy, said that "we have to go along with Seagram". (R. 39, 40). Petitioner's president immediately telephoned Calvert Sales' general sales manager, who said that it "had

to go along with the other side of the house," by which he meant Seagram (R. 41).

Calvert and Calvert Sales each answered in the affirmative an interrogatory inquiring whether between November 6, 1946, and February 3, 1947, officers of the Seagram respondents had communicated or conferred with it "with reference to the delivery or nondelivery of Calvert products" to petitioner (R. 379, 383). In response to a further interrogatory, each replied that it was "unable to give any specific dates of any such conferences or communications" (*ibid.*).

The evidence to which we have referred would seem to furnish adequate support for a finding by the jury that the Seagram and Calvert respondents had acted in concert and pursuant to agreement in refusing to deal with petitioner, in order to induce it to adopt specified maximum resale prices. The jury might have concluded that such conspiracy was entered into some time between November 11, 1946, and November 19, 1946, the latter being the date on which Calvert Sales precipitately repudiated the distributorship which, so shortly before, it had sought and made plans to foster and exploit. The jury may have believed the testimony that the only explanation given for the about-face of Calvert Sales was that it was required to act in unison with Seagram, which had stock control of Calvert. And the jury may have failed to give credence to

the testimony of respondents' officers that communications and conferences between Seagram officers and those of Calvert Sales on the subject of withholding Calvert products from the petitioner followed, rather than preceded, Calvert Sales' sudden reversal of policy.

Both private litigants in treble-damage actions and the Government in its own actions under the Sherman Act generally find it difficult to adduce direct proof of conspiracy. Agreements to restrain trade are seldom reduced to writing, and proof in such cases frequently rests on circumstantial evidence which the defendants attempt to rebut by oral testimony. It then becomes the function of the jury to weigh the credibility of the defendants' testimony against the permissible inferences to be drawn from their conduct. In the instant case, the conclusion of the jury that the defendants had participated in the conspiracy charged presumably was based not only upon circumstantial evidence but upon direct testimony indicating that Calvert's refusal to act as a supplier of petitioner was occasioned by what Calvert deemed to be the necessity of acting in concert with Seagram. Under such circumstances, for an appellate court which did not hear the evidence or see the witnesses to decide, as a matter of law, that the evidence was insufficient to sustain the verdict, is a clear-cut usurpation of the function of the jury—a

function which this Court has been at pains to preserve.[3]

Respectfully submitted.

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NOVEMBER 1950.

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[3] See *United States* v. *Knight*, 336 U. S. 505; *Bozza* v. *United States*, 330 U. S. 160; *United States* v. *Bruno*, 329 U. S. 207; *Burton* v. *United States*, 202 U. S. 344; *Crumpton* v. *United States*, 138 U. S. 361; *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649; *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29. But compare *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363 (C.A. 8), certiorari denied, 339 U. S. 942.

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PETITION FOR RE-HEARING

IN THE

Supreme Court of the United States

October Term, 1950.

No. 297

KIEFER-STEWART COMPANY,

Petitioner,

vs.

JOSEPH E. SEAGRAM & SONS, INC., SEAGRAM-DISTILLERS CORPORATION, THE CALVERT DISTILLING COMPANY AND CALVERT DISTILLERS CORPORATION,

Respondents.

PETITION FOR REHEARING.

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THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

IN THE

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OCTOBER TERM, 1950.

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JOSEPH E. SEAGRAM & SONS, INC., SEAGRAM-DISTILLERS CORPORATION, THE CALVERT DISTILLING COMPANY AND CALVERT DISTILLERS CORPORATION,

Respondents.

PETITION FOR REHEARING.

Respondents respectfully petition the Court to grant rehearing of the above cause, modify the opinion and mandate heretofore rendered and reverse the judgment of the District Court and order a new trial of said cause for the reasons following:

I.

It is respectfully suggested that this Court has overlooked the significance and effect under the prevailing Indiana practice, of the trial court's failure to instruct the jury that the acquisition of the Calvert stock was not illegal; and that this failure amounted in effect to a direct invitation to the jury to find for plaintiff merely because

Seagram had acquired the Calvert stock, and Calvert had thereby been caused to "go along with Seagram," and this error of the trial court requires a new trial and not affirmance.

In Indiana *the complaint is taken to the jury room,* and a charge based upon proof of "facts alleged in the complaint" insufficient in law to authorize recovery (without specification of the controlling facts) is error.

> *Terre Haute, Indianapolis & Eastern Traction Company* v. *Scott*, 197 Ind. 587, 598; 150 N. E. 777, 780-781.

The complaint *alleged* directly that the Seagram defendants sought to "maintain prices" and control Calvert dealings to that end by "the exercise over defendant Calvert and Calvert (Sales) of the influence unlawfully acquired by defendant Seagram (Indiana) by reason of the aforesaid unlawful stock acquisition." (R. 11-12.) It was also alleged that subsequent to November 12, 1946, Seagrams did induce Calvert to enter into such conspiracy and was "able to induce defendants Calvert and Calvert (Sales) to enter into" such conspiracy "as a direct and proximate result of the unlawful acquisition" of Calvert stock. (R. 14.) Finally, it was alleged that plaintiff had suffered damages "as a proximate result of * * * of said unlawful acquisition * * * of defendant Calvert's common stock * * * and of the influence unlawfully exercised by Seagram (Indiana) over defendants Calvert and Calvert (Sales) as a result of such acquisition." (R. 16.) Thus the Sherman Act "conspiracy charged in the complaint" was at least in one aspect alleged *to have been accomplished by the acquisition of Calvert stock.*

The Court's charge defined "conspiracy" *as used in the Sherman Act* as "a confederation or agreement by and between two or more persons to accomplish by concerted

action, an unlawful or oppressive object, or a lawful object by *unlawful* or oppressive *means*" (our italics) and informed the jury that "The first question, therefore, for you to determine is whether or not a contract or conspiracy did exist as alleged in the complaint, by and between the defendants". (R. 266.) He also charged: "If, therefore, you find from a preponderance of the evidence that such a contract or conspiracy was entered into by the defendants for the purpose of fixing the resale prices of their products, then you shall find that such contract was illegal within the meaning of this statute, and it will not be necessary for you to go any further into the reasons why it was illegal. * * * if you find that a *conspiracy as charged in the complaint* was entered into, then your duty is very simple in determining that there was such a conspiracy and then you pass on to the damages, if any, which the plaintiff sustained." (R. 267-268, italics supplied.)

In the charge itself, the Court directed specific attention to the allegation that in 1945 Seagram acquired all the common stock of Calvert and thus gained control of its principal competitor and parenthetically admonished them to "keep that date in mind because it may become important." It is obvious that it could have had *no importance* unless in connection with the charge of Clayton Act violation. The Judge had also attempted to discredit Fischel's testimony that he did not control Calvert policies by allusion to the 100% stock control and had said flatly that "of course under those conditions Seagram would have a good deal to say about the policies." (R. 263.)

Consequently, when the Court refused to charge that the stock acquisition was not illegal, any reasonably alert juryman might, *with the complaint before him,* well reason thus:

> "Plaintiff claims that Seagram suppressed competition by acquiring Calvert stock, and the Judge has

indicated that this gave Seagram control of Calvert and is important. The law says that a restraint is illegal and the Judge defined an illegal conspiracy as use of unlawful means to accomplish a lawful object. Even if Wachtel and Fischel told the truth, Seagram illegally suppressed competition and restrained trade by acquiring this stock, otherwise, why did the Judge stress its importance and jump on to Fischel about it? Therefore I believe that defendants are in an illegal conspiracy."

We submit that not only has this Court fallen into inadvertent error in stating that "a formal withdrawal of this issue would have served only to confuse," but that when failure to withdraw it is viewed in the light of the complaint, the remarks of the judge during the trial, and the emphasis placed upon it, both directly and indirectly, by the instructions given, serious and prejudicial error resulted.

Both under Federal and State practice, refusal to withdraw an issue or count upon which there is *no* evidence, is prejudicial error, unless it can definitely be determined that *no* prejudice resulted.

> *Wilmington Star Mining Co. v. Fulton* (1907), 205 U. S. 60, 78.
>
> *Jarrett* v. *Ellis* (1923), 193 Ind. 687, 692.

Here, we respectfully submit, the great balance of probability is that prejudice *did* result.

This probability is intensified by consideration of the nature of petitioner's evidence, which three experienced Judges thought wholly insufficient to sustain the verdict, the positive nature of respondents' testimony of no collusion, only circumstantially discredited; the fact that the jury required approximately 22 hours to reach a verdict (R. 273-279) and only did so after an almost mandatory

re-instruction (R. 276) which in the light of the Court's remarks and instructions concerning the stock acquisition could have meant to the jury but one thing, namely, to return a verdict for plaintiff.

We submit, therefore, that the verdict cannot stand, and that regardless of other errors, this alone would require a new trial.

II.

Respondents also strongly urge that errors in the admission of evidence relating to damages, duly assigned (Points 7, 9, 10, 11, 12, R. 362-364) but not passed upon by the Court of Appeals because of reversal on other grounds, and not directly adverted to by this Court, require a new trial.

These errors are:

(1) The erroneous admission of evidence relevant only to show respondents' wealth and size.

Over the objection of respondents, petitioner was permitted to read to the jury the answer to Calvert (Sales) interrogatory 8, showing dollar sales volume of this respondent to have ranged from over \$39,000,000 in 1938 to over \$140,000,000 in 1948 (R. 144, 377); Calvert (Sales) 10, showing Indiana sales ranging from less than \$1,000,000 in 1942 to over \$2,500,000 in 1948 (R. 144, 378); Calvert 24 and 25 showing the huge Calvert distilling and bottling capacity (R. 146, 389); Seagram (Indiana) 31 and 32 showing the huge Seagram producing and bottling capacity (R. 148, 388); and a portion of Seagram, Indiana, 25 showing total sales of \$314,098,381.41 in 1948. (R. 148, 391.)

The only possible relevance of any of these figures, with the possible exception of Calvert Indiana sales, was to show the size and extent of respondents' business and ability to respond in damages.

Since only *actual* damages were to be assessed by the jury, respondents' size, wealth and ability to respond were wholly irrelevant to any legal issue, and by the same token the admission of the evidence was highly prejudicial.

> *Washington Gas Light Co.* v. *Lansden* (1899), 172 U. S. 534, 554-55.

(2) The erroneous admission of accountant's calculation made from petitioner's books, and Alcoholic Beverage Commission records, without production of such books and records.

This witness testified that, having for several years been an auditor familiar with petitioner's books, he had "made a study and analysis of the figures and *facts* in order to make an estimate of the loss and (of) profits resulting to Kiefer-Stewart during the years 1947, 1948 and the first three months of 1949 *because of its not having the Seagram and the Calvert line of whiskies* to sell to its customers". (Our italics.) (R. 119.)

He was then permitted, over objection that the question "calls for a hearsay conclusion, based upon books whose authenticity has not been established and whose method of accounting has not been "established", that the loss was \$679,378. (R. 121.) He was then permitted, over renewed objection, to detail total sales for 1946, \$10,931,300; 1947, \$3,992,358; 1949 (3 mos.), \$703,975; the same three months of 1946, \$2,239,335; the percentage loss for 1947 over 1946, 36.52 per cent; 1948, 28.52 per cent. (R. 121-122.)

Over like objection (R. 126) the witness was allowed to repeat the same figures as to sales, and to attest total loss or falling off of sales of \$16,287,879. (R. 126.) Still over objection, he was permitted to testify that profits would have been 61 per cent on this volume or a total of \$1,050,000; and that the lower figure of \$679,378 was calculated upon a basis "which recognizes a general decline in the State in the liquor business". (R. 128.) So far as appears, the

"general decline in the State" had been ascertained from "examination of certain of the record of the Indiana Alcoholic Beverage Commission" (R. 122), apparently stamp sales. (R. 123.)

Hence, it clearly appears that this witness was permitted to testify to a plausibly detailed and speciously intricate guess as to what "might have been", based entirely upon records never produced, never authenticated and never seen by court, jury or petitioners.

Whether the witness had accurately abstracted the records, whether the method of cost accounting used was sound or otherwise, whether the "assumptions" made had been accurately applied to the figures, whether the Alcoholic Beverage Commission stamp sales accurately represented actual wholesale liquor sales for the period in question; in short, whether the projection had any more validity than an astrological horoscope, could not possibly be ascertained without production of the books and records. We submit that this ruling was prejudicial error.

Cabel v. *United States* (1940), 113 F. (2d) 998, is quite illustrative. In that case a witness for petitioner plaintiff was permitted to detail results of an analysis of respondents' *own* books, without producing them. Having analyzed certain cases cited to justify this, the court said:

> "The above and similar cases have been cited to us by counsel for the plaintiff, but in no case that has come to our attention does it appear that such testimony has been admitted unless the books or documents which are the basis of the testimony of the expert witness have been produced in court and made available for purposes of cross-examination. We can see no reason for any further relaxation of the rule as to the best evidence than as stated above, and it seems to be well settled that, at least, the production in court of the books or records which have been the subject of the examination by the expert witness is a prerequisite to the admission of his testimony construing them."

Similar rulings in other circuits are:

Pabst Brewing Co. v. *E. Clemens Horst Co.* (C. C. A. 9, 1916), 229 F. 913, 918.

Phillips v. *U. S.* (C. C. A. 9, 1912), 201 F. 259, 269.

Hagan Coal Mines, Inc. v. *New State Coal Co.* (C. C. A. 8, 1928), 30 F. (2d) 92.

The above inadmissible evidence was the sole basis for any award of damages. We believe that its admission requires a new trial.

III.

In affirming the correctness of the trial court's instruction that petitioner's participation in the conspiracy of Indiana wholesalers constituted no defense to this action, this Court has wholly ignored the fact that all damages alleged or proved consisted of profits lost in resale of merchandise, which profits, at least so long as petitioner was participant therein, were the profits of an illegal conspiracy; and has thereby placed business condemned by Section 1 of the Sherman Act within the protection of Section 4.

However correct the decision that the illegal conduct of petitioner could not legalize unlawful combination of respondents, we respectfully suggest that the Court has fallen into grave error in stating that it could not "immunize them against liability to those they injured."

For the latter proposition are cited only *Fashion Originators' Guild* v. *Trade Comm'n* (1941), 312 U. S. 457, and *Mandeville Island Farms* v. *American Crystal Sugar Co.* (1948), 334 U. S. 219, 242-243.

The first case supports the proposition that the United States may suppress an illegal combination, although it is directed at illegal practices of competitors, *but does not hold* that the competitors could have recovered threefold

damages consequent upon the effect of the combination upon the profits of their own illegal enterprise. This distinction is alluded to by Murrah, J., in *Moore* v. *Mead Service Co.* (C. A. 10, 1950), 184 F. 2d 338, 341.

In the *Mandeville Farms* case, producer-sellers of sugar beets were allowed damages based upon reduced prices consequent upon an illegal price fixing combination engaged in by the buyer to whom their beets had been sold. While the fact that the plaintiff had *sold* to a member of the combination had been urged as making it *particeps criminis,* and had been so adjudged in the *trial* court (*Mandeville Island Farms Inc.* v. *American Crystal Sugar Co.* (D. C. Cal. 1946), 64 F. Supp. 265, 267), neither this Court nor the Court of Appeals (159 F. 2d 71) alluded to it. Since plaintiff had no market for beets, except a member of the combination, the fact that plaintiff sold to a member at the illegally depressed price could scarcely have made plaintiff a participant in the conspiracy.

In the instant case, however, Kiefer-Stewart's alleged damage resulted from respondents' refusal to supply merchandise to be resold in violation of law (*i. e.,* at prices fixed by illegal combination) and the opinion of this Court *awards petitioner as damages the lost profits of an illegal enterprise.* Petitioner's only damage was alleged to have resulted from deprivation of merchandise to be resold (R. 16), and the proof of damage offered was an estimate of profits lost by reason of diminished sales (R. 121-128, 139). The profits allegedly lost were not the profits of plaintiff's legitimate drug business, but profits lost by lost sales of liquors at *prices* which for an indefinite period were prices fixed and established by illegal combination with petitioner's competitors. Whatever respondents' guilt, however tortious their conduct, it is, we submit, contrary to every principle of our law that a plaintiff should be awarded dam-

ages resulting solely from diminution of the profits of an illegal enterprise.

Damages from breach of a warranty of the speed of a truck may not be predicated upon profits lost, where earning the lost profits at the warranted speed would have resulted in a law violation.

> *Shelley* v. *Hart* (Ct. of App. Cal. 1931), 112 Cal. App. 231, 242, 297 Pac. 82, 87.

A tavernkeeper may not include in the lost profits due to his landlord's breach of covenant the profits lost from the prevention of illegal Sunday operations.

> *Raynor* v. *Blatz Brewing Co.* (1898), 100 Wis. 414, 420, 76 N. W. 343, 345.

Deprivation of the services of employees engaged in unlawful liquor sales and loss of wages paid them are not recoverable as damages for wrongful levy.

> *Young* v. *Stevenson* (1905), 75 Ark. 181, 184, 86 S. W. 1000, 1001.

Lost profits from operation of a gambling house are not recoverable as damages for wrongful levy and seizure of its equipment.

> *Kauffman* v. *Babcock* (1887), 67 Tex. 241, 244, 2 S. W. 878, 879.

To hold that respondents might not legally *combine* to refuse merchandise to the conspiring Indiana wholesalers is one thing. To hold that the participants in this illegal conspiracy may recover the profits lost by reason of respondents' refusal to furnish merchandise for illegal resale is quite another. If grocers *combine* to refuse sugar to illicit distillers; if printers *combine* to deny lottery tickets to lotteries; if beer distributors *combine* to with-

hold supplies from "blind pigs", are the lost profits of these illegal enterprises to be protected and restored in an action for damages? Are the profits of a business being conducted in violation of Section 1 of the Sherman Act within the protection of Section 4? Two Federal Courts of Appeals have said no.

> *Maltz* v. *Sax* (C. C. A. 7, 1943), 134 Fed. 2d 2, 5.
>
> *Moore* v. *Mead Service Co.* (C. A. 10, 1950), 184 F. 2d 338, 340, and opinion of Murrah, Circuit Judge, specially concurring, p. 341.

Respondent introduced (R. 48, 194; 299-322) and offered (R. 191, 195) evidence well nigh conclusive to show that at the time respondents ceased shipments to petitioner, petitioner and other Indiana wholesalers were engaged in marketing liquor at prices unlawfully fixed by an unlawful conspiracy such as that condemned by this Court in *U. S.* v. *Frankfort Distilleries* (1945), 334 U. S. 495. The lost profits which have been awarded petitioner unquestionably include profits lost by reason of not having had respondents' merchandise to sell at these illegal prices. We submit, therefore, that in instructing the jury wholly to disregard evidence of petitioner's participation in this illegal conspiracy the trial court committed seriously prejudicial error.

Respectfully submitted,

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The foregoing Petition for Rehearing is believed to be meritorious and is presented in good faith and not for delay.

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